

Attorney's Docket: 2004DE411
Serial No.: 10/594,210
Art Unit 1796
Response to Office Action Mailed 12/31/2007

REMARKS

The Office Action mailed December 31, 2007 has been carefully considered together with each of the references cited therein. The amendments and remarks presented herein are believed to be fully responsive to the Office Action. Accordingly, reconsideration of the present Application in view of the following remarks is respectfully requested.

Applicant has amended the claims to attend to housekeeping matters and to more clearly describe the invention. In claim 1, Applicant has replaced the term "ester quat composition" with the term —concentrated ester quat composition—and combined the element recited in claim 9 with claim 1. In claims 1 and 2 in R³ the term "C₁-C₆-hydroxyalkyl" was replaced by the term —hydroxyethyl—. Support for these amendments may be found in originally filed claims 1-10 and in Applicant's Specification in Examples 1-7 on pages 6 – 9 wherein all examples have R³ being hydroxyethyl. Claim 9 was deleted. It is believed that no new matter has been introduced by this amendment.

Claims 1- 8 and 10, 12-13 were rejected under 35 U.S.C. 102(b) as being anticipated by Abend et al. US Patent no. 5,961,966 (herein after referred to as the '966 Patent). The rejection of claim 1, as amended under 35 U.S.C. 102(b) as being anticipated by Abend et al. US Patent No. 5,961,966 should be withdrawn for the reason that the '966 Patent does not disclose all of the elements of Applicant's invention. The '966 Patent discloses a quaternary fatty diester of 2-hydroxypropyl diethanol amine and aqueous dispersions thereof useful as fabric softening products, laundering products, household cleaning products and personal hair and skin care products. Nowhere in the '966 Patent is there disclosed a concentrated ester quat composition which contains from 0.1 to 3.0 percent by weight based on the concentrated ester quat composition of a pH modifier selected from the group consisting of triethanolamine, monoethanolamine, ethylenediamine, dialkylamine, dialkyl methyl amine, ethoxylated alkyl amine, methyl propanol alkyl amine, and mixtures thereof. It is fundamental that all elements of a claim must be found united in the same way to perform the identical function for a reference to establish

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anticipation. Anticipation is a technical defense which must meet standards: Unless all of the same elements are found in exactly the same situation and united in the same way to perform the identical function in a single prior art reference, there is no anticipation. Unless all of the elements of a claimed invention can be found in a single reference, it cannot be said that such a claim is anticipated by that reference. The '966 patent disclosure is limited to preparing compositions based on aqueous dispersions of an ester quat based on a fatty diester of 2-hydroxypropyl diethanol amine which is not included in Applicant's claimed composition and there is no disclosed range of composition for a pH modifier. Therefore, the rejection of claim 1, as amended under 35 U.S.C. 102(b) as being anticipated by the '966 Patent should be withdrawn for the reason that the '966 Patent does not disclose all of the elements of Applicant's invention. The rejection of claims 2-8 and 10, 12-13 under 35 U.S.C. 102(b) as being anticipated by '966 Patent should be withdrawn for the reasons given in support of claim 1 from which they depend.

Claims 9 and 11 were rejected under 35 U.S.C. 103(a) as being unpatentable over Abend et al. (US Patent No. 5,961, 966). The rejection of claim 1, as amended, under 35 U.S.C. 103(a) as being unpatentable over Abend et al. (US Patent No. 5,961, 966) should be withdrawn for the reason that the '966 Patent teaches away from Applicant's invention. At column 4, line 38, the '966 Patent states:

The compounds of the present invention have a much lower temperature at which they are a clear liquid and a much lower congealing point. Although unexpected, this is a highly desirable property, because the compounds can be stored at lower temperatures than their TEA [Distearyl Triethanolamine Ester Quaternary Salt] analogues. This results in less time and energy being needed to melt the compounds and less energy to keep them molten. The lower storage temperatures can also result in improved compound stability during extended storage periods. In addition, the low congealing point relative to the TEA analogues means less problems transferring the compounds from the storage vessel to the compounding vessel. In a production setting, these types of compounds are usually pumped through transfer lines which need to be pre-warmed in order to prevent the product from solidifying in the line during transfer. The compounds of the present invention offer a significant advantage over their TEA analogues due to their significantly lower congealing points.


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Thus, the '404 Reference teaches compositions based on aqueous dispersions of an ester quat based on a fatty diester of 2-hydroxypropyl diethanol amine, and clearly teaches away from ester quats having a hydroxyethyl substituent. Therefore, no one skilled in the art based solely on the disclosure of the '966 Patent would arrive at Applicant's claimed composition which contains an ester quat having a hydroxyethyl substituent and from 0.1 to 3.0 percent by weight based on the concentrated ester quat composition of a pH modifier. Prior art references must be read as a whole and consideration must be given where a reference teaches away from the claimed invention. Therefore, the rejection of claim 9 and claim 11, as amended, under 35 U.S.C. 103(a) as being unpatentable over Abend et al. (US Patent No. 5,961,966) should be withdrawn for the reason that the '966 Patent teaches away from Applicant's invention as claimed, and for the reason that to imbue one of ordinary skill in the art with knowledge of Applicant's invention, when no prior art reference of record conveys or suggests that knowledge, is to fall victim to a hindsight syndrome wherein that which only the inventor taught is used against its teacher.

It is respectfully submitted that, in view of the above remarks the rejections under the judicially created doctrine of obviousness-type double patenting, and the rejections under 35 U.S.C. 102, and 103, should be withdrawn and that this application is in a condition for an allowance of all pending claims. Accordingly, favorable reconsideration and an allowance of all pending claims are courteously solicited.

An early and favorable action is courteously solicited.

Respectfully submitted,



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